No. 04-1072

IN THE

Supreme Court of the United States

RAYMOND ABRAMS, NICOLE BE SILBERKLEIT, JANET HERMAN, LILY REDNER, BERNARD CARON, ERNEST HAAR, HARRY CYBULSKI, YVONNE LITMAN, CASSANDRA KIRBY CONAHAY FREUND, JEAN-JACQUES FRAENKEL, LILIANE LICHTENSTEIN and MARIE WEINRAUCH,

Petitioners,

v.

SOCIETE NATIONALE DES CHEMINS DE FER FRANCAIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

ANDREAS F. LOWENFELD*
LINDA J. SILBERMAN
40 Washington Square South
New York, NY 10012-1099
(212) 998-6208

* *Counsel of Record*

Attorneys for Respondents

193083

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Does immunity from suit in United States courts conferred on instrumentalities of a foreign state by the Foreign Sovereign Immunities Act of 1976 apply to claims based on conduct prior to passage of the Act?

STATEMENT PURSUANT TO RULE 29.6

Respondent Société Nationale des Chemins de Fer Français (SNCF) is a corporation formed under the Laws of France, with the task of operating the French railway and associated facilities. All of the stock of SNCF is owned by the French Republic.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
STATUTE INVOLVED	1
STATEMENT	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE COURT OF APPEALS CORRECTLY APPLIED THE *ALTMANN* DECISION TO THIS CASE.	4
A. This Court's Decision Left No Room for Misunderstanding	4
B. The Court of Appeals Correctly Applied the Judgment in *Altmann* to the Present Case.	9
II. THERE IS NO SUPPORT FOR PETITIONERS' ATTEMPT TO INVOKE THE *LANDGRAF* PRESUMPTION AGAINST RETROACTIVITY TO REVIVE THEIR CLAIM.	10

Contents

Page

III. PETITIONERS' ALLEGATION THAT THEIR REASONABLE EXPECTATIONS ARE FRUSTRATED BY "RETROACTIVE IMMUNIZATION" OF RESPONDENT IS BASED ON A SERIES OF ERRONEOUS ASSERTIONS. 13

CONCLUSION 15

APPENDIX — LETTER FROM STATE AND JUSTICE DEPARTMENT TO COURT OF APPEALS DATED AUGUST 10, 2004 ..... 1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Abrams v. Société Nationale des Chemins de Fer Français, 332 F.3d 173 (2003) 11, 13, 14

Abrams v. Société Nationale des Chemins de Fer Français, 389 F.3d 61 (2d Cir. Nov. 9, 2004) 3, 5, 9, 12

Argentine Republic v. Amerada Hess Shipping Corporation, 488 U.S. 428 (1989) 8

Berizzi Brothers Co. v. The Pesaro, 271 U.S. 562 (1926) 14

Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938) 14

Dole Food Co. v. Patrickson, 538 U.S. 468 (2003) 7, 8, 10, 11

Ex Parte Republic of Peru, 318 U.S. 578 (1943) .. 14

Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) 13

Republic of Austria v. Altmann, 541 U.S. 677, 124 S. Ct. 2240 (June 7, 2004) ..... *passim*

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 4, 10, 11, 12

Cited Authorities

Page

Republic of Mexico v. Hoffman, 324 U.S. 30 (1945) 14

Société Nationale des Chemins de Fer Français v. Abrams, 541 U.S. __, 124 S. Ct. 2834 (June 14, 2004) 3, 4, 5, 8, 9

Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004) ... 13

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) 13

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 7, 14

Statutes:

28 U.S.C. § 1602 1

28 U.S.C. § 1603 1

28 U.S.C. § 1605(a)(3) 5

STATUTE INVOLVED

Foreign Sovereign Immunities Act of 1976
U.S. Code, Title 28
(Excerpts)

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

. . .

STATEMENT

This is the second time the present controversy is before this Court. When the case came before the Court for the first time on petition of the present Respondent, the Court held up the petition pending decision in *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (June 7, 2004). Following the decision in *Altmann*, the Court granted the petition, vacated the judgment of the Court of Appeals for the Second Circuit, and remanded the case for further consideration in light of the decision in *Altmann*. *Société Nationale des Chemins de Fer Français v. Abrams*, 541 U.S. __, 124 S. Ct. 2834 (June 14, 2004).

Following briefing by both sides, as well as by the U.S. government, the Court of Appeals held that it was bound by the Court's decision in *Altmann* and directed the District Court to dismiss the case for lack of subject matter jurisdiction. *Abrams v. Société Nationale des Chemins de Fer Français*, 389 F.3d 61 (2d Cir. Nov. 9, 2004). The present petition is based on the assertion that the Court of Appeals misunderstood this Court's decision in *Altmann* and the remand order in this case. There is no reason to believe that the Court of Appeals misunderstood, and no justification for this Court to take up the case again.

SUMMARY OF ARGUMENT

1. The Court of Appeals correctly followed this Court's instruction, based on the clear holding that the immunity of a foreign sovereign under the Foreign Sovereign Immunities Act is determined as of the filing of the action, regardless of the date of the conduct on which the action is based. There is no dispute that Defendant SNCF was entitled to immunity

as of the date the action was filed, and there is no basis for distinguishing for this purpose between the state itself and a corporation directly owned by the state.

2. Petitioners' attempt to invoke this Court's analysis in *Landgraf v. USI Film Products* to revive their action is directly contrary to this Court's judgment in *Altmann*.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE *ALTMANN* DECISION TO THIS CASE.

A. This Court's Decision Left No Room for Misunderstanding

In *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (2004), plaintiffs sought to bring a claim for expropriation for which immunity would not be granted under the Foreign Sovereign Immunities Act of 1976. Their claim was based on conduct by the government of Austria in the 1940s, when immunity from suit would have been in effect. In response to the plea by Austria that permitting the action to go forward would be "impermissibly retroactive," Justice Stevens, writing for the Court, pointed first to the preamble of the Act:

> "Claims of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. 1602 (emphasis by the Court).

541 U.S. at ___, 124 S. Ct. at 2252.

While this passage might not be an express command, the Court's opinion continues, "this language is unambiguous: Immunity 'claims' – not actions protected by immunity, but assertions of immunity to suits arising from those actions – are the relevant conduct regulated by the Act; those claims are 'henceforth' to be decided by the courts." 124 S Ct. at 2252-53. Further, the judgment accepts the District Court's suggestion that "Congress intended courts to resolve *all* such claims 'in conformity with the principles set forth' in the Act regardless of when the underlying conduct occurred." 541 U.S. at __, 124 S. Ct. at 2253.

Abrams v. Société Nationale presents the reverse fact pattern from *Altmann v. Austria*, where it was defendants that sought to avoid the FSIA, because the exception to immunity for claims of expropriation was not adopted until passage of the Act. 28 U.S.C. § 1605(a)(3). In the present case, it is plaintiffs who seek to avoid the FSIA, based on their contention (which Respondent rejects[1]) that prior to the passage of the Act Defendant SNCF would not have been entitled to immunity, whereas under the Act there is no doubt that Defendant SNCF is immune. But there is nothing in the Court's opinion in *Altmann* that could lead anyone to conclude that application of the FSIA "regardless of when the underlying conduct occurred" pertains only to instances where the legislation limits immunity, thereby expanding jurisdiction, and not when the legislation confirms or expands immunity, thereby restricting jurisdiction.

In response to the invitation of the Court of Appeals when considering the remand, the State and Justice Departments filed a letter brief setting forth their view that after *Altmann*

---

1. *See* pp. 14-15, *infra*.

the FSIA applied whether it broadened or narrowed the immunity that a foreign state or instrumentality had had prior to passage of the Act:

> The Court's analysis in *Altmann* does not admit of a distinction between instances in which the FSIA offers a *narrower* immunity than foreign states historically enjoyed and those cases in which the current foreign policy confers a *broader* immunity for foreign states. The FSIA, the Supreme Court held in *Altmann*, represents the political branches' current determination that certain classes of suits present sufficient risk of interfering with the country's international relations that they should not be heard in the United States' courts. Nothing in *Altmann* suggests that only Congress's determination that certain cases *can* proceed should be given immediate effect, or that a court is free to set aside Congress's conclusion that other suits should *not* be heard based on the court's own view that the Executive Branch would historically have allowed those suits to go forward. Indeed, if anything, courts should be more deferential to the FSIA's provisions reflecting a determination that certain cases should *not* proceed. Ignoring that policy judgment risks disrupting our relations with foreign states in a manner the political branches have sought to avoid.[2]

---

2. Letter Brief dated August 10, 2004 from Appellate Staff, Civil Decision, U.S. Department of Justice and Office of Legal Adviser, U.S. Department of State, at p. 4. The complete letter is reproduced as an Appendix to this Brief in Opposition.

Petitioners seek to avoid this Court's holding in *Altmann* by contending that the opinion did not reach government-owned corporations. The Court's opinion in *Altmann* expressly rejects the thrust of that contention – that some provisions of the FSIA could be applied in a given case, others not, pointing out that the Act's overall structure "strongly supports" the conclusion that all claims against foreign sovereigns, as defined, are to be resolved in conformity with the principles set forth in the Act:

> Many of the Act's provisions unquestionably apply to cases arising out of conduct that occurred before 1976. In *Dole Food Co. v. Patrickson*, 538 U.S. 468, 123 S. Ct. 1655, 155 L.Ed.2d 643 (2003), for example, we held that whether an entity qualifies as an "instrumentality" of a "foreign state" for purposes of the FSIA's grant of immunity depends on the relationship between the entity and the state at the time suit is brought rather than when the conduct occurred. In addition, *Verlinden* [*B.V. v. Central Bank of Nigeria*, 461 U.S. 480], which upheld against constitutional challenge 28 U.S.C. § 1330's grant of subject-matter jurisdiction, involved a dispute over a contract that predated the Act.... And there has never been any doubt that the Act's procedural provisions relating to venue, removal, execution, and attachment apply to all pending cases. Thus, the FSIA's preamble indicates that it applies "henceforth," and its body includes numerous provisions that unquestionably apply to claims based on pre-1976 conduct. In this context, it would be anomalous to presume that an isolated provision (such as the expropriation exception on

> which respondent relies) is of purely prospective application absent any statutory language to that effect.

541 U.S. at ___, 124 S. Ct. at 2253.

The State/Justice brief unequivocally supports Respondent's position that the FSIA applies to all actions filed following passage of the Act:

> *Altmann* itself makes clear that the FSIA's definition of foreign states to encompass agencies and instrumentalities of those states is, like the rest of the Act, to be applied to all post-enactment cases. Indeed, *Altmann*'s analysis of the retroactivity issue of the FSIA relied in significant respect on the Court's understanding of its holding the prior year in *Dole Food*, which focused on the agency or instrumentality provision. As the Court explained in *Altmann*, *Dole Food* "held that whether an entity qualifies as an 'instrumentality' of a foreign state for purposes of the FSIA's grant of immunity depends on the relationship between the entity and the state at the time suit is brought rather than when the conduct occurred." *Altmann*, 124 S. Ct. at 2253. The scope Congress gave to the definition of a "foreign state" to include an "agency or instrumentality" is, as much as the other immunity provisions of the FSIA, a foreign policy judgment as to the extent of "comity" we should extend to foreign states.[3]

---

3. State/Justice Letter Brief, note 2 *supra*, p. 5. *See also Argentine Republic v. Amerada Hess Shipping Corporation*, 488 U.S. 428, 437-38 (1989).

In short, any attempt to distinguish *Abrams* from *Altmann* – either on the basis that one case involved opening and the other involved closing the door to U.S. courts, or on the basis that one case involved the state itself and the other a state instrumentality – must fail, as the Court of Appeals clearly understood.

B. The Court of Appeals Correctly Applied the Judgment in *Altmann* to the Present Case.

On remand from this Court, the Court of Appeals acknowledged that the inquiry it had initiated when the case first came before it was no longer necessary or appropriate, because the purpose of sovereign immunity, as this Court had held, is not to help shape foreign states' future conduct but to "reflect . . . current political realities and relationships." 369 F.3d at 63, quoting from 541 U.S. at ___, 124 S. Ct. at 2252.

As to plaintiffs' argument that this Court's holding in *Altmann* should not bind the court in *Abrams* because SNCF was a corporate entity and not a state at the time of the alleged conduct, the Court of Appeals correctly said that this fact is immaterial after *Altmann*, 389 F.3d at 64.[4] Though the Court of Appeals was clearly unhappy with the instructions from this Court, it made no mistake in applying them. The District Court had dismissed the action on the basis of sovereign immunity,

---

4. The Court of Appeals apparently believed that SNCF was a non-governmental entity at the time of the alleged misconduct. This statement is not correct. *See* the District Court's opinion, 173 F. Supp. 2d 423 at 425-26. However, the Court of Appeals was correct in stating that this allegation is immaterial. As the court said, "Once the railroad is encompassed by the FSIA, its prior incarnation as a private entity does not bar the statute's retroactive application." *Id.*

and the reversal and remand of that judgment by the Court of Appeals had been reversed by this Court. Accordingly, the Court of Appeals recalled its mandate to the District Court and affirmed that court's dismissal of the action.

The judgment of the Court of Appeals leaves no room, and supplies no reason, for this Court to revisit the case.

II. THERE IS NO SUPPORT FOR PETITIONERS' ATTEMPT TO INVOKE THE *LANDGRAF* PRESUMPTION AGAINST RETROACTIVITY TO REVIVE THEIR CLAIM.

Faced with the clear statement in *Altmann* that the presumption against retroactivity "is just that – a presumption", 541 U.S. at ___, 124 S. Ct at 2250, and that the rationales supporting the presumption do not fit the considerations governing foreign sovereign immunity, *id.* at ___, 124 S. Ct. at 2252, Petitioners seek to distinguish the present case by contending that the Court in *Altmann* focused only on defendant's expectations, not on those of the plaintiffs.

In fact, this Court distinguished between reliance by parties on settled rules in shaping their primary conduct, as in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and the considerations governing the grant of sovereign immunity, both before and after passage of the Foreign Sovereign Immunities Act. As the Court wrote, sovereign immunity "reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* protection from the inconvenience of suit as a gesture of comity." 124 S. Ct. at 2252, quoting from *Dole Food Co. v. Patrickson*, 538 U.S. 468 at 479 (2003). Accordingly, it was

more appropriate, absent contraindications, to defer to the decisions of the political branches – namely, the policy reflected in the FSIA – "than to presume that decision inapplicable merely because it postdates the conduct in question." *Id.* In other words, foreign sovereign immunity is not about expectations at all, but about a judgment, made by Congress since 1976, concerning what entities qualify as foreign sovereigns and what claims against foreign sovereigns may be heard in United States courts.

The Second Circuit, which in its earlier decision had relied on *Landgraf* to remand the case to the District Court, *Abrams v. Société Nationale des Chemins de Fer Français*, 332 F.3d 173 at 180-86 (2003), understood clearly that it had been reversed precisely on this issue. Quoting the passages quoted above, the Court of Appeals wrote:

> . . . the [Supreme] Court concluded that the retroactivity analysis established in *Landgraf* . . . , and upon which this panel had relied, was inappropriate. Further, the Supreme Court stated that the Act's preamble, as well as its overarching thematic structure, indicated Congress' design for the Act to apply retroactively.
>
> . . .
>
> Appellants [Petitioners here] misapprehend the *Altmann* holding by stating that it "turns upon the fact that the foreign government enjoyed no settled expectation in avoiding suit.". . . The Supreme Court stated, to the contrary, that reliance interests are inapplicable in assessing the retroactivity of sovereign immunity principles because immunity

> simply "reflects current political realities and relationships."

389 F.3d at 63, 64.

There is, of course, one difference between *Altmann* and the present case: In *Altmann*, the post-conduct legislation created jurisdiction where there was none before, while in the present case the post-conduct legislation bars jurisdiction where (at least arguably) jurisdiction existed previously. In this connection, it is worth noting that even the dissenters in *Altmann*, who would have applied the presumption against retroactivity in that case, made clear that a statute that operated to *foreclose* jurisdiction of a lawsuit (including where it in fact stripped previously existing jurisdiction from the courts) could be applied "without fear of working any retroactive effect." 124 S. Ct. at 2267 (Kennedy, J. dissenting). Thus, it is clear that all nine Justices of this Court agreed that nothing in the *Landgraf* doctrine would preclude recognition of immunity under the FSIA for an entity such as SNCF, regardless of the date of the conduct on which the claims were based.

There is no reason to revisit the relationship of the *Landgraf* doctrine to the FSIA, and no reason to disturb the correct disposition of this case by the Court of Appeals in accordance with this Court's instructions.

III. PETITIONERS' ALLEGATION THAT THEIR REASONABLE EXPECTATIONS ARE FRUSTRATED BY "RETROACTIVE IMMUNIZATION" OF RESPONDENT IS BASED ON A SERIES OF ERRONEOUS ASSERTIONS.

1. The assertion that plaintiffs in the 1940s had the expectation of being able to sue a corporation owned by the government of France in a United States court is inherently incredible. Indeed, the fact is that not until well after passage of the FSIA did some courts in the United States consider that they had jurisdiction over the kind of claim attempted in this case. Compare *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) with *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). *See also Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, esp. 2761-66 (2004).

2. The assertion (Petition p. 5) that discovery in this case "clearly indicated" that SNCF had no immunity prior to enactment of the FSIA is false. No such outcome appeared in the discovery process, which was halted by the Magistrate Judge following this Court's decision in *Altmann.*[5]

5. The Court of Appeals directed the District Court to develop a record on which the Court could base a determination whether plaintiffs legitimately could have expected to litigate their claims in the United States, 332 F.3d at 187-88. On remand, the District Court wrote to the State Department to see if it could provide any information relevant to this factual inquiry. Eventually, a reply from an attorney at the Civil Division of the Justice Department "respectfully declined" the invitation to participate in the inquiry, at least until the Supreme Court decided the *Altmann* case and acted on the petition for certiorari filed by the present Respondent and then pending. Other aspects of discovery probed SNCF's charters and personnel at different times, but no evidence emerged to establish that a claim for immunity by SNCF would have been denied prior to passage of the Act.

3. Petitioners' entire case depends on the assertion that the Foreign Sovereign Immunities Act of 1976 closed a door to their claims that had previously been open. That assertion runs up against the well-known fact that until 1952 the United States followed the doctrine of absolute immunity for foreign states, *i.e.*, the doctrine that made no distinction between claims arising out of commercial activity and claims arising out of government activity. *See*, for a concise summary, *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 at 486-88 (1983). Notwithstanding some resistance in lower U.S. courts and abandonment of the absolute theory of immunity in many other countries (but not the United Kingdom and states following the British model), this Court several times reaffirmed the doctrine in controversies arising out of commercial activities conducted by ships or other government-owned entities. *See Berizzi Brothers Co. v. The Pesaro*, 271 U.S. 562 (1926); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938) (dictum); *Ex Parte Republic of Peru*, 318 U.S. 578 (1943).

The Court of Appeals in the present case acknowledged this fact, and also understood that courts in the United States uniformly granted immunity whenever the State Department made a suggestion to that effect. 332 F.3d at 176, 187. There were a few instances in which the State Department did not "recognize and allow" a claim of immunity, typically when there was doubt about the ownership or possession of a vessel for which immunity was claimed. *See*, *e.g.*, *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945). The most that could have been said about the immunity of a state-owned corporation prior to 1952 was that one could not always be sure what position the State Department would take.

It was the possibility that the State Department might not have "recognized and allowed" a claim of immunity that led the Court of Appeals in the present case to vacate the decision of the District Court and order discovery concerning the State Department's view at the relevant time, an inquiry subsequently rejected in *Altmann*, 124 S. Ct. at 2254. There certainly could have been no settled expectations on the part of Petitioners that they could have obtained jurisdiction over SNCF on the present claims in United States courts, and to speak of "retroactive immunization" (Petition p. 14) is well wide of the mark.

CONCLUSION

The petition presents no open issue calling for Supreme Court resolution, and no error by the Court of Appeals that calls for correction by this Court. The petition should be denied.

Respectfully submitted,

ANDREAS F. LOWENFELD*
LINDA J. SILBERMAN
40 Washington Square South
New York, NY 10012-1099
(212) 998-6208

Attorneys for Respondents

* *Counsel of Record*